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No. 94-1916

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SAC-CO, INC.,
d/b/a ACME CASH REGISTER COMPANY,
f/k/a CBS LIQUOR CONTROL, INC.,
Petitioner,

v.

AT&T GLOBAL INFORMATION SOLUTIONS COMPANY,
f/k/a NCR CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:
DONALD J. FRIEDMAN
ROBERT L. DEITZ
PERKINS COIE
Suite 800
607 14th Street, N.W.
Washington, D.C. 20005-2011
(202) 434-1605

JOSEPH R. GUERRA
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

TODD B. CARVER *
C. MARK KINGSEED
AT&T GLOBAL INFORMATION SOLUTIONS COMPANY
Law Department
101 West Schantz Avenue
Dayton, Ohio 45479-0001
(513) 445-6766

MARC E. MANLY
AT&T CORP.
131 Morristown Road
Basking Ridge, NJ 07920
(908) 204-8446

Attorneys for Respondent AT&T Global Information Solutions Company

* Counsel of Record

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QUESTION PRESENTED

Where an arbitrator expressly finds that a party is not entitled to punitive damages, then exceeds his authority by awarding punitive damages to non-parties, is it error for a lower court to vacate the punitive damages award in its entirety, rather than modify the award to confer it on the party the arbitrator expressly found was not entitled to such damages?

STATEMENT REQUIRED BY RULE 29.1

1. Petitioner Sac-Co, Inc. conducted business as Acme Cash Register Company and was formerly known as CBS Liquor Control, Inc. ("Acme").

2. Respondent AT&T Global Information Solutions Company is a wholly-owned subsidiary of AT&T Corp. and was formerly known as NCR Corporation ("NCR"). AT&T Corp. owns an equity interest in the following publicly traded companies:

> Compagnie Industriali Riunite, S.p.A. (Italy); and
> AT&T Capital Corporation.

AT&T owns an equity interest in the following non-publicly traded companies, which have public debt outstanding:

> AT&T Credit Corporation;
> AT&T Global Information Solutions Company (formerly NCR Corporation); and
> McCaw Cellular Communications, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

In the decision below, the Sixth Circuit held that a magistrate properly vacated part of an arbitration decision awarding punitive damages to entities that were not parties to the arbitration. The lower court's disposition of this highly unusual award does not conflict with the decisions of any other court of appeals and raises no issues worthy of this Court's review.

1. In 1989, respondent sued petitioner Acme for monies due and owing under a promissory note and deferral payment agreement. After petitioner filed a counterclaim alleging various unfair competition and tortious interference claims, respondent moved to arbi-

trate the entire dispute. At the conclusion of the arbitration proceedings, the arbitrator issued a decision and three separate awards. Two of these awards—one awarding respondent $10,710 on its claim and another awarding petitioner $58,896 plus expenses on its counterclaim—were confirmed below and are no longer at issue.

In the third award, the arbitrator assessed punitive damages totalling $1,335,180 against respondent. The arbitrator expressly stated that these damages were *not* to be awarded to petitioner, but rather were entered in favor of entities who were not parties to the arbitration. The arbitrator stated:

> It should be specifically noted that the damages which I have labeled punitive, I have awarded against NCR. *I have not awarded them in favor of Acme* and that is a conscious decision. It is not acceptable, in this Arbitrator's view, to give [Acme] a windfall simply in order to accomplish the deterrence role of punitive damages. Pet. App. at A66 (emphasis added).

The arbitrator acknowledged that an award of punitive damages to non-parties was "unique," but emphasized that he had fashioned the award in this manner to avoid any "unjust[] reward or . . . windfall to Acme." Pet. App. at A64. Punitive damages would amount to a "windfall" for petitioner, he explained, because "[t]here was simply not a sufficient level of probative and credible evidence upon which an Arbitrator could rationally decide that NCR had wronged Acme with respect to any specific transaction." Pet. App. at A47. Apparently anticipating that his unique punitive damages award to non-parties was beyond his authority, the arbitrator included a provision permitting severance of any portion of the decision or awards found to be void, illegal, or beyond his power.

2. In motions filed in the District Court below, both respondent and petitioner agreed that the arbitrator had

exceeded his authority by awarding punitive damages to non-parties. Respondent sought to have this separate award vacated in its entirety. Petitioner, by contrast, sought to have vacated or severed only that part of the punitive damages award naming the recipients of those damages. The result of such relief would be to confer the entire award of punitive damages on petitioner.

The magistrate vacated the punitive damages award in its entirety and denied petitioner's motion for "partial" vacatur, as well as petitioner's subsequent motion for reconsideration or, in the alternative, for a remand. On appeal, the Sixth Circuit affirmed. The court found that "the arbitrator exceeded his authority by resolving a dispute which may or may not have existed between [respondent] and its other nonservicing dealers, and by determining the rights of individuals who were not parties." Pet. App. at A7. The award was thus properly vacated under both Section 10 of the Federal Arbitration Act, which provides that awards may be vacated "[w]here the arbitrators exceeded their powers" (9 U.S.C. § 10(d)), and Section 11, which permits modification "[w]here the arbitrators have awarded upon a matter not submitted to them" (*id.* at § 11(b)). Pet. App. at A8.

The Sixth Circuit also upheld the lower court's refusal to vacate only that part of the punitive damages award naming the recipients of those damages, reasoning that such a "partial" vacatur would result in an improper modification. Pet. App. at A7-A8. The court noted that judicial authority to modify arbitration awards derives solely from Section 11, which does not authorize modifications that "affect[] the merits of the controversy." Pet. App. at A8. The court reasoned that "vacating the award to the nonparties would result in an over $1 million dollar judgment to Acme; clearly a modification that would affect 'the merits of the controversy.'" *Id.* And such a modification would frustrate, rather than effectuate, the intent of the arbitrator, for it "would provide the windfall

to Acme which the arbitrator expressly rejected." *Id.* The court further held that severing only that part of the award that named the recipients of the punitive damages would likewise constitute an improper modification, and that the "severance" provision of the award could not be used to trump the language of Section 11. Pet. App. at A9. Finally, the court held that the magistrate properly declined to remand the award, inasmuch as the arbitrator had unambiguously expressed his intent that petitioner was not to receive the award of punitive damages. *Id.*

3. Petitioner's claim that the Sixth Circuit's unremarkable and manifestly correct decision warrants review by this Court is without merit. The decision below is fully consistent with the "partial vacatur" line of authority petitioner cites. Petitioner's cases do not involve situations in which courts "vacated" selected phrases and words that were integral to the arbitration awards under review; rather, these cases involved the vacatur of separate and independent parts of an award. See *Enterprise Wheel & Car Corp.* v. *United Steelworkers,* 269 F.2d 327, 330 (4th Cir. 1959) ("if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, *if* it is of such character that the court can separate the part within from the part beyond the submission") (emphasis added; citations omitted), *rev'd in part on other grounds,* 363 U.S. 593 (1960); *Moyer* v. *Van-Dye-Way Corp.,* 126 F.2d 339, 341 (3d Cir. 1942) ("[i]t may also be taken as established that if the arbitrator has failed to execute his entire commission *and* that which he has done does not stand alone but depends upon the part unsettled, the award, as a whole, must fall") (emphasis added; citations omitted); *Puerto Rico Maritime Shipping Auth.* v. *Star Lines Ltd.,* 454 F. Supp. 368, 372 (S.D.N.Y. 1978) ("if an award is valid in part and invalid in part, *and* the valid portion concerns claims that are 'separable' from and 'non-depend-

ent' on claims covered by the invalid portion, the valid portion of the award is confirmable") (emphasis added; citations omitted). That is precisely what the Sixth Circuit did here by vacating the "separable" and "independent" part of the award—*i.e.*, the punitive damages portion—and allowing the remaining, valid portions—the compensatory awards—to stand.

Nor did the lower court err by considering whether the "partial" vacatur petitioner sought would "affect[] the merits of the controversy" within the meaning of Section 11. To "vacate" only that part of an award naming the recipients, and thereby grant the award to a party the arbitrator expressly identified as undeserving of it, is plainly an act of "modification" governed by Section 11. Indeed, although petitioner claims that no other court has decided when a proposed modification "affects the merits of the controversy" (Pet. at 11) or viewed Section 11(c) as a limitation of judicial authority (*id.* at 10), one of the very cases petitioner cites does both of these things in a manner completely consistent with the decision below.[1] The Sixth Circuit correctly concluded that it is improper, and beyond a court's authority, to change an arbitration award in a manner that renders it flatly inconsistent with the unambiguously expressed intent of the arbitrator,[2] and petitioner cites no case or authority to the contrary.

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[1] In *Diapulse Corp. of Am.* v. *Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980), the Second Circuit concluded that Sections 10 and 11 do not permit courts to alter the scope of an arbitration award. The court dismissed the suggestion (similar to petitioner's here) "that the district court's revision of the arbitration award, which transformed a very broad non-competition injunction into a relatively narrow one, did not affect matters of substance that were at the heart of the controversy," and held that "[t]his sort of judicial intervention into the arbitral process is precisely what the narrowly defined provisions of sections 10 and 11 were designed to *prevent*." *Id.* at 1110 (emphasis added).

[2] Given the arbitrator's clear intent, the courts below did not err by refusing to remand the case for clarification, a remedy that

The decision below raises no issues worthy of this Court's attention. Petitioner itself refers to the arbitrator's punitive damages award to non-parties as "an absurd, *ultra vires* experiment" in which the arbitrator engaged in "aberrant behavior" to "dispense his own brand of industrial justice." Pet. at 14-15. Even the arbitrator referred to his punitive damages award as "unique to [his] own research." Pet. App. at A64. The decision below was plainly correct and involves unique facts that are unlikely to recur.[3]

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is not only discretionary and disfavored (*see Flender Corp.* v. *Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992); *Colonial Penn Ins. Co.* v. *Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991)), but appropriate only where the arbitrator's award is ambiguous. *Brown* v. *Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 780 n.4 (11th Cir. 1993); *United Steelworkers* v. *New Idea Farm Equip. Corp.*, 917 F.2d 964, 968 (6th Cir. 1990); *Olympia & York Fla. Equity Corp.* v. *Gould*, 776 F.2d 42, 45 (2d Cir. 1985). In all events, the question whether this particular case should have been remanded is manifestly not one requiring this Court's attention.

[3] Petitioner's suggestion that the lower court's decision leaves adversely affected entities without a remedy is likewise wrong. Because an arbitration is not binding upon non-parties and has no preclusive effect on them (*International Bhd. of Elec. Workers* v. *O.K. Elec. Co.*, 793 F.2d 214, 216 (8th Cir. 1986); *Kurt Orban Co.* v. *Angeles Metal Sys.*, 573 F.2d 739, 741 (2d Cir. 1978)), the non-parties (other dealers) are not precluded by the vacatur of the punitive damages award from pursuing any remedies they might have against respondent.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Of Counsel:
DONALD J. FRIEDMAN
ROBERT L. DEITZ
PERKINS COIE
Suite 800
607 14th Street, N.W.
Washington, D.C. 20005-2011
(202) 434-1605

JOSEPH R. GUERRA
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

TODD B. CARVER *
C. MARK KINGSEED
AT&T GLOBAL INFORMATION SOLUTIONS COMPANY
Law Department
101 West Schantz Avenue
Dayton, Ohio 45479-0001
(513) 445-6766

MARC E. MANLY
AT&T CORP.
131 Morristown Road
Basking Ridge, NJ 07920
(908) 204-8446

Attorneys for Respondent AT&T Global Information Solutions Company

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* Counsel of Record